No. 80-1684

MAY 23 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PEAT, MARWICK, MITCHELL & Co.,
ANTHONY M. NATELLI and JOSEPH SCANSAROLI,
Petitioners,

v.

WACHOVIA BANK AND TRUST Co., N.A., MELLON BANK, N.A., FIRST WISCONSIN TRUST Co., THE DREYFUS OFFSHORE TRUST, N.V., and NATIONAL FIRE INSURANCE Co. OF HARTFORD,
Respondents.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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1. *The "implied" remedy.* The response of Wachovia Bank scarcely acknowledges the question presented by the PMM petition:

> May a federal court create a damage remedy under § 17(a) of the Securities Act of 1933 or § 10(b) of the Securities Exchange Act of 1934 for purchasers of securities who cannot establish the elements of any of the express causes of action which those Acts provide injured purchasers?

The Court should once and for all settle whether private damage remedies which have been "implied" under §§ 17(a) and 10(b) need not have their source in Congressional intent, although the Court has made the intent of Congress

the Constitutional touchstone for the determination of whether a private remedy may properly be inferred from a statute which provides none.

Just this week the Court said in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, —— U.S. —— (No. 79-1144, May 26, 1981), at p. 8, that "Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress." The Court held that federal courts are without authority "to formulate what has come to be known as 'federal common law'" when, as here, what is at issue "involv[es] the rights and obligations of private parties" and "[t]here is nothing in the statute itself, in the legislative history, or in the overall regulatory scheme to suggest that Congress intended courts to have the power to alter or supplement the remedies enacted." (*Id.* at pp. 10, 12, 15)

The court of appeals took no account of Congressional intent. Instead, it provided a remedy because no express remedy was available (33a, 35a). Such rulings have been aptly characterized by Professor Loss:

> "What has happened to Rule 10b-5 . . . always reminds me of a cartoon of the time showing Mussolini dictating to his secretary, and the caption was, 'Miss Baccigalupi, take a law.'" L. Loss, *History of S.E.C. Legislative Programs and Suggestions for a Code*, 22 Bus. Law. 795, 796 (1967).

Wachovia Bank says inaccurately that the question presented is "inappropriate" insofar as it relates to § 17(a) of the 1933 Act because the court of appeals did not decide that question. (Wachovia Bank Br. 18 n.12) The question was decided by the district court (49a), and it was raised by PMM in the court of appeals (17a-18a). The Court held in *New York Transit Authority* v. *Beazer*, 440

U.S. 568, 583 n. 24 (1979): "The failure of the Court of Appeals to address the statutory issue decided by the District Court does not, of course, prevent this Court from reaching the issue. Cf. *University of California Regents* v. *Bakke*, 438 U.S. 265." *Accord, Northwest Airlines, Inc.* v. *Transport Workers Union*, 49 U.S.L.W. 4383, 4385 & n.15 (U.S. April 20, 1981).

Counsel for Wachovia Bank has written of the § 17(a) question, R. Phillips & M. Miller, *The Demise of Implied Rights*, 13 Review of Securities Reg. 887, 889 (1980):

> "Because these express causes of action [under the 1933 Act] are limited in scope and present certain disadvantages to plaintiffs—for example, a relatively short statute of limitations—those bringing suit have often argued that an action for damages should be implied by the courts [*sic*] under section 17(a). While the lower courts have been divided, the Supreme Court has yet to address this question. However, the issue has apparently been resolved by the Court's analysis in *Transamerica*. Congress expressly authorized private suits for damages under section 12(2) for purchasers of securities offered or sold in violation of section 17(a); '[o]bviously, then when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly.'
>
> "Like section 206 of the Investment Advisers Act, section 17(a) outlaws fraudulent conduct but it 'does not in terms create or alter any civil liabilities.' Accordingly, under the *Transamerica* analysis, evidence of congressional intent weighs against the implication of a private right of action in a case brought under section 17(a)." (Footnote omitted)

It is difficult to distinguish § 10(b) from § 17(a) and, as observed in the dissent in *Transamerica Mortgage*, 444

U.S. 11, 25 n.1 (1979), "The provisions of § 206 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6, are substantially similar to § 10(b) of the Securities Exchange Act of 1934." How then can judicial implication of a § 10(b) remedy be justified?

The Court said in *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 477 (1977), that it has "recognized an implied cause of action under [§ 10(b)] in some circumstances." In fact, the Court has sustained a § 10(b) remedy, without analysis, in two cases, *Superintendent of Insurance* v. *Bankers Life & Casualty Co.,* 404 U.S. 6 (1971), and *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128 (1972). Both involved sellers who, in contrast to purchasers, have no cause of action under the 1933 Act. Whether a private cause of action may properly be inferred from § 10(b) of the 1934 Act was not raised in either case or in any other case decided by the Court. The Court said in *Aaron* v. *SEC,* 446 U.S. 680, 689, 691 (1980), that a private damage action "was not within the contemplation of the Congress that enacted § 10(b)" and that it has "assumed" the existence of the implied cause of action.

Wachovia Bank says "[p]etitioners simply cannot escape the significance of this Court's repeated confirmation of a private claim for relief under Section 10(b)" (Wachovia Bank Br. 13). This is not only a grievous exaggeration but precisely the sort of "unthinking abstraction" against which the Court warned in *SEC* v. *National Securities, Inc.,* 393 U.S. 453, 465 (1969).

> "[T]his is the first time this Court has found it necessary to interpret [§ 10(b)]. We enter this virgin territory cautiously. The questions presented are narrow ones. They arise in an area where glib generalizations and unthinking abstractions are major occupational

> hazards. Accordingly, in deciding this particular case, remembering what is not involved is as important as determining what is." (*Ibid.*)

Wachovia Bank relies upon *National Securities* as support for "overlapping" of remedies under the federal securities laws (Wachovia Bank Br. 17-18). The Court, however, carefully pointed out in *National Securities* that "[t]his case presents none of the complications which may arise in determining who, if anyone, may bring private actions under § 10(b) . . . . This is a suit brought by the Commission." (393 U.S. at 467 n.9)

Wachovia Bank says the writ should not issue because "for 35 years, without the slightest hint of Congressional disapproval, lower court interpretations had made Section 10(b) the most important and widely utilized private remedy under the securities laws" (Wachovia Bank Br. 13) and because the remedy implied by lower courts is "totally different" from the express remedies enacted by Congress (*id.* at 8). These assertions only beg the question presented by the PMM petition.

Post-enactment Congressional "silence" concerning the lower court decisions does not provide the answer to the question. As the Court said in *Helvering* v. *Hallock*, 309 U.S. 106, 119-20 (1940):

> "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities."

Congressional silence will not support the judicial lawmaking at issue here. *See also Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 79-80 (1938):

"The fallacy underlying the rule declared in *Swift* v. *Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that . . . federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law':

'but law in the sense in which courts speak of it today does not exist without some definite authority behind it, . . .'

"Thus the doctrine of *Swift* v. *Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' In disapproving that doctrine we do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." (Footnote omitted)

Congress did not intend in 1934 to "imply" the remedy which the court of appeals ruled is available to Wachovia Bank. Neither the court of appeals nor Wachovia Bank point to any evidence that Congress thereafter considered and approved such a remedy. To the contrary, Congress explicitly recognized in 1956 that "there is no civil liability" in the circumstances alleged by Wachovia Bank, *H. R. Rep. No. 2513,* 84th Cong., 2d Sess. at 5 (1956) (*see* PMM Petition pp. 15-16), and as demonstrated in the brief of the American Institute of Certified Public Accountants as *amicus curiae* (pp. 17-18) the SEC advised Congress

in 1959 that there is no private civil liability for aiding and abetting a violation of the federal securities laws.

Wachovia Bank relies upon the rationale of the court of appeals that to deny a federal remedy in this case would leave respondents "without any remedy" (Wachovia Bank Br. 14) and devotes considerable energy to attempting to prove the wrong they have alleged (*id.* at 2-9). The argument that a remedy should be "implied" because a wrong was allegedly done is only a reiteration of the common law statutory tort concept rejected by the Court in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 576-78 (1979).*

The "successful criminal action" against Mr. Natelli to which Wachovia Bank refers (Wachovia Bank Br. 2) related to a misstatement in NSMC financial statements contained in its 1969 proxy statement, filed with the SEC. *United States* v. *Natelli*, 527 F.2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). Wachovia Bank disclaimed reliance (34a) and did not institute this action until "well beyond the time allowed" by Congress in connection with any express remedy based upon the proxy statement (29a).**

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* Wachovia Bank, moreover, ignores common law remedies available under state law, although Congress recognized in §§ 16 of the 1933 Act and 28(a) of the 1934 Act that the express remedies are in addition to any remedies available at common law.

** The conviction was based, moreover, upon a finding of recklessness. The trial judge said of Mr. Natelli on the record:

> "I think you are absolutely sincere when you say that you did not believe that you did anything wrong on this audit or audits for National Student Marketing. After thinking about this matter for a long time, I think you honestly mean that. But the tragedy is that the jury found that this was an audit or audits [which] were reckless."

Mr. Natelli has received a Presidential pardon, and he has been readmitted to practice as a certified public accountant before the Securities and Exchange Commission.

The record in this case precisely defines the question concerning the existence and dimensions of "implied" remedies under §§ 10(b) and 17(a). The question is vital and unresolved. It should be settled.

2. *Retroactivity.* The second question is:

> May a litigant avoid the retroactive effect of a previous decision when he is unable to show that all three factors of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), favor prospective-only effect?

Wachovia Bank asserts that "Supreme Court resolution of this issue would have no effect on future cases because the law on the statute of limitations question has changed drastically in the last decade." (Wachovia Bank Br. 19) The assertion is a *non sequitur*. More important, it incorrectly assumes that resolution of the question concerning the meaning of *Chevron Oil* would have effect only upon statutes of limitations issues.

If, as happened here, a court may deny retroactive effect to a decision based upon fewer than all of the *Chevron* factors, precedent ceases to have meaning. Wachovia Bank acknowledges a conflict among the circuits (Wachovia Bank Br. 23) on the question presented by the PMM petition.

The second question is an important federal question as to which there is a conflict among the circuits.

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

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